SUPREME COURT, U. S.
APR 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1299

SERVICE TECHNICIANS, INC., a California corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Claims.

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IN THE

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No. .....

SERVICE TECHNICIANS, INC., a California corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Claims.

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Claims entered in this matter on January 17, 1975.

Opinions Below.

The opinion of the United States Court of Claims sought to be reviewed is unreported at this time and is set forth in Appendix A to this petition. (Appendix A, p. 1.)

The opinion of the trial judge of the Court of Claims and the opinions of the Armed Services Board of Contract Appeals are also reprinted in the Appendix as follows:

1. Opinion of Judge Willi filed February 22, 1974, denying Plaintiff's motion for summary judgment and granting Defendant's cross-motion for summary judgment. (Appendix B, pp. 2-10.)

2. Opinion of Armed Services Board of Contract Appeals rendered on April 9, 1973, denying Petitioner's motion for reconsideration. (Appendix C, pp. 11-18.)

3. Opinion of Armed Services Board of Contract Appeals rendered on September 12, 1972, denying Petitioner's appeal. (Appendix D, pp. 19-42.)

Jurisdiction.

The order of the United States Court of Claims denying Petitioner's motion for summary judgment, granting Respondent's motion for summary judgment and dismissing the petition of Petitioner is dated January 17, 1975, and was entered by the United States Court of Claims on said date.

Jurisdiction is conferred upon this honorable court by 28 USC §1255(1).

Questions Presented.

1. Whether in the case of a contract entered into with an agency of the United States government as a result of an advertised solicitation which contract is drafted solely and exclusively by the United States government and which contract contains an ambiguous provision should a reasonable interpretation of the contract by the contractor entitle the contractor to an equitable adjustment in the contract price in the event that said interpretation does not coincide with the interpretation given to the procuring agency of said provision.

2. Whether a bidder on an advertised solicitation issued by an agency of the United States government has a duty to search said solicitation for any ambiguities therein and put the procuring agency on notice of said ambiguities or suffer the risk of loss for adopting

a reasonable interpretation of said solicitation in the event said interpretation may differ from that of the procuring agency, and, if so, under what circumstances does said duty arise.

Constitutional and Statutory Provisions Involved.

This case involves matters of general contract law and is not governed by any constitutional or statutory provisions.

Statement of the Case.

Petitioner, a California corporation, was awarded United States Air Force Contract No. F02604-71-C-0211 on June 18, 1971, for the performance of custodial services at Luke Air Force Base, Arizona, as a result of an advertised procurement. The term of the contract was July 1, 1971, through June 30, 1972, and was in the amount of One Hundred Two Thousand One Hundred Eighty-Two Dollars and Twenty-Eight Cents ($102,182.28) on a firm fixed price basis.

Pursuant to the terms and provisions of the subject contract Petitioner was to perform two specific types of services, to wit: "Regular Custodial Services" and "Extended Custodial Services". Exhibit A hereof includes Section TP1-02 of the Technical Provisions of the contract which attempts to define the term "Extended Services" in a footnote on page 14 thereof which reads as follows:

> "*Extended service for these buildings shall include:
>
> 1. b(damp mopping), and u(application of floor finish) weekly.
> 2. bb(floor finish removal) and cc(application of floor finish) quarterly.

> Example: In Bldg. 151 which has 2,760SF, the +560SF only means that while the entire building receives standard service, only 560SF receives extended service."

Exhibit B consists of a chart which was part of the contract which purportedly also defines the scope of work for "Regular Custodial Services" and "Extended Custodial Services" and the portion of each building which is to receive said service.

Section 2-13 of the Technical Provisions of the contract provided that damp mopping and application of floor wax was to be performed weekly. Section TP2-15 stated that floor finish removal and primary floor finishing was to be accomplished on a semi-annual basis.

The footnote at the bottom of Exhibit A and the chart which consists of Exhibit B hereto illustrate that the only difference between "Regular Custodial Services" and "Extended Custodial Services" was in the floor maintenance services. Other than floor maintenance all other items to be performed under "Regular Custodial Service" and "Extended Custodial Service" were identical.

In preparing its bid on the above-referenced contract Petitioner assumed that "Extended Custodial Service" was to be performed in lieu of "Regular Custodial Service" and on the basis of the footnote contained in Exhibit A for those areas denominated to receive "Extended Custodial Service" Petitioner prepared its bid on the basis that the floors would be damp mopped and floor wax applied once per week and floor finish removal and application of floor finish would occur quarterly. In the areas denominated to receive "Regular Custodial Service" Petitioner prepared its bid on the

basis that damp mopping and application of floor finish would occur weekly and that floor finish removal and application of floor finish would occur semi-annually.

Shortly after the commencement of the contract a dispute arose between Petitioner and Respondent in that Respondent disagreed with Petitioner's interpretation of the specifications of the contract and took the position that those areas which were denominated to receive "Extended Custodial Service" were also to receive "Regular Custodial Service" and, therefore, as to the floor finish servicing of said area the floors were to be damp mopped and floor wax applied twice per week, once under the "Regular Custodial Service" provision and once under the "Extended Custodial Service" provision, and that floor finish removal and application of floor wax was to occur six times per year, to wit: twice under the "Regular Custodial Service" and four times under the "Extended Custodial Service".

Petitioner duly performed the contract according to Respondent's interpretation thereof and timely filed a claim for an equitable adjustment under the contract. The contracting officer issued a final decision denying said claim and Petitioner duly appealed said decision to the Armed Services Board of Contract Appeals. The Armed Services Board of Contract Appeals denied Petitioner's appeal as well as a motion for reconsideration filed by Petitioner.

Petitioner filed its complaint in the United States Court of Claims under 28 USC §1491 praying for review of the decision of the Armed Services Board of Contract Appeals pursuant to 41 USC §321. On August 31, 1973, the court, on its own motion ordered

Petitioner to file a motion for summary judgment in the matter. Petitioner did, in fact, file said motion and Respondent filed a cross-motion for summary judgment. Petitioner in its motion argued that the specifications relating to extended services under the contract were vague and ambiguous and that the interpretation of Petitioner of the specifications was a reasonable interpretation. Petitioner further argued that since the contract had been drafted by the government the ambiguity should be construed against the government, and Petitioner's interpretation should be adopted since it was a reasonable interpretation of the ambiguity.

The trial judge held that the contract was not ambiguous (Appendix B, pp. 6-8) and that Petitioner's interpretation of the contract was "patently lacking in reasonableness." (Appendix B, p. 3.)

Petitioner duly requested review of the trial commissioner's recommendation pursuant to Rules 54(b)(3) and 166(e) of the Court of Claims. Briefs were filed in this matter and a hearing was held before a three-court panel on January 10, 1975. On January 17, 1975, the United States Court of Claims rendered its order in this matter which appears to hold that glaring ambiguities were present in the contract and that Petitioner's interpretation of the contract was reasonable. However, the Court holds that the ambiguity was so glaring that there was a duty or obligation upon Petitioner to make an inquiry before bidding and that Petitioner was not free to adopt a unilateral interpretation of the contract. (Appendix A, p. 1.)

REASONS FOR GRANTING THE WRIT.

I

The Rulings of the United States Court of Claims Holding That in the Case of a Contract Drafted by an Agency of the United States Government Which Is Ambiguous, an Interpretation by the Other Party to the Contract Which Is Reasonable Will Not Entitle That Party to Have Its Interpretation Adopted by the Court Unless the Party Proves That in Addition to Its Interpretation Being Reasonable the Ambiguity Was Not Patent or Glaring, Is Inconsistent With the Decisions of This Court and the Various Circuits.

It is hornbook law that the Federal government will be treated as any other contractor when contracting with private parties for goods and services and that the general law of contracts will apply. *United States v. Rice,* 323 U.S. 106, 111; *Priebe & Sons v. United States,* 332 U.S. 407, 411; *Hollerbach v. United States,* 233 U.S. 165, 171, 172; *United States v. Bethlehem Steel Corp.,* 315 U.S. 289, 298, 299. Furthermore, in determining the meaning and effect of contracts to which the United States is a party the governing rules must finally be determined by the Supreme Court of the United States. *S.R.A., Inc. v. State of Minnesota,* 327 U.S. 558, 564; *United States v. Alleghany County,* 322 U.S. 174, 183.

The general principle is that in the case of an ambiguity contained within a contract the ambiguity will be construed most strongly against the party drafting the contract provided, however, that the other party has adopted a reasonable interpretation of the contract. *United States v. Seckinger,* 397 U.S. 203, 211, rehearing denied 397 U.S. 1031; Restatement, Con-

tracts §§233, 236(d) (1932); 3 Corbin, Contracts §559; 4 Williston, Contracts §621 (3rd ed. 1961).

The general rule as set forth above has been adopted by all of the circuits. *North American Graphite Corp. v. Allan*, 184 F.2d 387, 390 (D.C. Cir. 1950); *Bay State Smelting Co. v. Ferric Industries, Inc.*, 292 F.2d 96, 99 (1st Cir. 1966); *National Equipment Rental, Limited v. Reagin*, 338 F.2d 759, 763 (2nd Cir. 1964); *F. H. McGraw and Co.*, 473 F.2d 465, 468 (3rd Cir. 1973), cert. denied 414 U.S. 1022 (1974); *Webb v. Old Salem, Inc.*, 416 F.2d 223, 226 (4th Cir. 1969); *Tenneco, Inc. v. Greater LaFourche Port Commission*, 427 F.2d 1061, 1065 (5th Cir. 1970), cert. denied 400 U.S. 904 (1970); *American Indem. Co. v. Sears, Roebuck & Co.*, 195 F.2d 353, 355 (6th Cir. 1952); *Schwerman Trucking Co. v. Gartland S.S. Co.*, 496 F.2d 466, 475 (7th Cir. 1974); *Megarry Bros., Inc. v. United States*, 404 F.2d 479, 487 (8th Cir. 1968); *Distillers Distributing Corp. v. J. C. Millett Co.*, 310 F.2d 162, 174 (9th Cir. 1962); *Medical Development Corp v. Industrial Molding Corp.*, 479 F.2d 345, 349 (10th Cir. 1973).

Early decisions of the Court of Claims were in agreement with the general rule. *Wunderlich Contracting Co. v. United States*, 143 Ct. Cl. 876, 878, 161 F.Supp. 741 (1958); *Orino v. United States*, 111 Ct. Cl. 491, 518-519, 77 F.Supp. 938, 942 (1948); *Chris Berg, Inc. v. United States*, 389 F.2d 401, 404, 182 Ct. Cl. 23 (1968); *Callahan Construction Co. v. United States*, 91 Ct. Cl. 538, 611-612 (1940); *Peter Kiewit Sons' Company v. United States*, 109 Ct. Cl. 390, 418 (1947); *W. H. Armstrong & Co. v. United States*, 98 Ct. Cl. 519, 527 (1943); *Merritt v. United States*, 95 Ct. Cl. 421, 428-429 (1942).

However, in recent years the United States Court of Claims has gradually drafted an exception to the general rule in cases in which the United States government is the contractor. This exception is to the effect that even though there is an ambiguity in the contract drafted by the government and even though the interpretation by the contractor is reasonable, if the ambiguity is patent or glaring then the contractor has the duty to determine whether its interpretation is, in fact, the interpretation given to the contract by the government. *Jamsar, Inc. v. United States,* 194 Ct. Cl. 819, 826-827, 442 F.2d 930, 934 (1971); *Blount Bros. Const. Co. v. United States,* 171 Ct. Cl. 478, 496, 346 F.2d 962, 972-973 (1965); *Anthony Grace & Sons, Inc. v. United States,* 193 Ct. Cl. 248, 254, 443 F.2d 766, 769 (1970); *Southern Construction Company v. United States,* 176 Ct. Cl. 1339, 364 F.2d 439, 454 (1966); *Space Corporation v. United States,* 200 Ct. Cl. 1, 5-6, 470 F.2d 536, 538-539 (1972).

Apparently in an attempt to rationalize this exception as merely an edification of the portion of the rule which requires that the interpretation of the contractor must be reasonable, the Court of Claims conceived the "zone of reasonableness test". Basically this test provides that even if the contractor's interpretation of the ambiguity is reasonable if the ambiguity is patent or glaring the unilateral interpretation of the contract by the contractor is not within the "zone of reasonableness" and, therefore, the contractor cannot prevail. *John McShain v. United States,* 199 Ct. Cl. 364, 378, 462 F.2d 489, 496 (1972); *Dana Corp. v. United States,* 200 Ct. Cl. 200, 216, 470 F.2d 1032, 1043 (1972); *Merando, Inc. v. United States,* 201 Ct. Cl. 19, 475 F.2d 598 (1973); *WPC Enterprises, Inc. v.*

United States, 163 Ct. Cl. 1, 6-7, 323 F.2d 874, 877 (1963); *J. W. Bateson Co. v. United States,* 196 Ct. Cl. 531, 543-548, 450 F.2d 896, 902-905 (1971).

Apparently dissatisfied with the "zone of reasonableness" test the Court of Claims has attempted to rephrase the exception which it has created to the rule to lend an appearance of compatibility with the rule. For instance, the court has held that the portion of the rules which requires the contractor to adopt a reasonable interpretation of the contract also includes a reasonable interpretation as to whether or not the contract, in fact, contains an ambiguity. *Max Drill, Inc. v. United States,* 192 Ct. Cl. 608, 625-626, 427 F.2d 1233, 1244 (1970); *Bishop Engineering Co. v. United States,* 180 Ct. Cl. 411, 415 (1967); *Merando, Inc. v. United States,* 202 Ct. Cl. 1097, 475 F.2d 601 (1973). An even more interesting concept has recently been presented by the Court of Claims which states that in order for a contract to be interpreted against the drafter not only must the contractor have interpreted the contract in a reasonable manner, but the ambiguity must be a "reasonable ambiguity". *Boeing Co. v. United States,* 202 Ct. Cl. 315, 329, 480 F.2d 854, 864 (1973); *Ace Construction Company v. United States,* 185 Ct. Cl. 487, 495, 401 F.2d 816, 820 (1968).

Except for limited instances the Court of Claims has exclusive jurisdiction to determine the claims of private contractors arising under government contracts. 28 USC §1491. Due to the minimal possibility of the

lack of direct conflict with decisions of the Court of Appeals this court should grant a writ of certiorari to determine the obligations of the government and the private contractor in situations where the contract is ambiguous.

II

The Question of Which Party Bears the Burden of an Ambiguity in a Government Contract Is of Major Importance.

The question of which party to the contract should bear the primary duty of ascertaining and responding to the ambiguity in the contract and that party's duty or lack thereof to the other party is of prime importance to persons dealing with the government.

In situations such as the case at bar in which the contract was procured by advertised bid with the private contractor having no other information except the solicitation prepared by the government upon which to prepare its bid, with no face to face contact with the contracting officer of the procuring agency or ability to negotiate the contract, it is extremely important to ascertain the rights and duties of each of the parties in determining whether ambiguities are, in fact, present and the party upon which the burden of the ambiguity should rest.

The current status of the law as set forth by the Court of Claims is that the government will be liable for ambiguities in contracts which it drafts, provided, however, that if it does a particularly poor job of drafting it will be able to shift the damage caused

by its inept drafting to the contractor. Indeed, the petitioner can conceive of circumstances in which the agency may desire to draft its contracts in this manner since at worst the contractor will adopt the agency's interpretation in bidding the contract and at best the contractor may choose the wrong interpretation and bid the contract at a lesser price, thereby giving the agency a windfall. The agency cannot lose in this situation and may very well benefit at the expense of the contractor.

These possibilities place persons dealing with the government in an intolerable position.

Conclusion.

It is respectfully requested that this court accept certiorari in this matter in order to determine the apparent conflict in principle between the Court of Claims and the Court of Appeals and to determine the rights and duties of parties to an advertised government contract containing an ambiguity.

Respectfully submitted,

H. ROY JEPPSON,
Attorney for Petitioner.

EXHIBIT A.

Technical Provisions

Section I

Scope of Work

TP 1-01 SCOPE: The work covered by these specifications consists of furnishing custodial services in strict conformance to these provisions and subject to the terms and conditions of the contract.

TP 1-02 GENERAL: This specification covers all buildings listed. Requirements for all items of services may not exist in each building; some do not have carpets, windows, etc. Where they exist, they will be serviced. A pre-bid conference of interested prospective bidders and tour of the buildings in the schedule of items will be arranged.

Bldg Nr.	Sq Ft Floor Area	Description (Facility Occupant)	Time Period Available For Work Performance	Number Days Per Week
151	2,760	Post Office	0800-1630	6 — *560 SF Only
17	3,155	Bank, Resident Auditor, Red Cross	1800-0700	5 — *513 SF Only
439	7,220	Base Ops	1800-0700	7 — *See Note #1
	128	So. Mobile Base Ops	1800-0700	4
	128	No. Mobile Base Ops	1800-0700	4
935	14,561	Base Supply (DMS)	1800-0700	5 — *
11	10,120	Wing Headquarters	1800-0700	5 — *Includes 720 SF carpet
12	5,000	Base Headquarters	1800-0700	5 — *Includes 1130 SF carpet
470	17,515	Wing Maint Cont Admin	1800-0700	5 — *1320 SF Only This 1320 SF area also receives service on the 6th day.
999	8,328	Hq Reserve Forces	1800-0700	5
163	4,200	NCO Academy	1800-0700	5
656	11,700	Academic Class Room	1800-0700	5 — See Note #2
904	15,350	Cmbt Crew Tng Sqdn	1800-0700	5 — *1068 SF Only
700	12,490	Service Club	2300-0700	6 — *Includes 7340 SF carpet
799	10,344	Chapel	0800-1630	5 — *Includes 3712 SF carpet
25	3,630	Chapel	0800-1630	5 — Includes 997 SF carpet
159	4,300	Educational Center	0800-1630	5

Bldg Nr.	Sq Ft Floor Area	Description (Facility Occupant)	Time Period Available For Work Performance	Number Days Per Week
195	2,615	Hq Gp Air Base	1630-0800	5 — Includes 762 SF carpet
896	5,450	Youth Center	0800-1630	5
175	1,900	Personnel Processing	1800-0700	5
659	6,850	Personnel Processing	1800-0700	5 — *
129	4,360	Military Personnel	1800-0700	5
514	2,360	Military Personnel	1800-0700	5
164	4,300	Civilian Personnel	1800-0700	5
263	4,620	Civil Engr Admin	1800-0700	5
264	4,220	Civil Engr Admin	1800-0700	5
327	9,371	Civil Engr Cont Cent	1800-0700	5
416	6,530	Combt Crew Tng Sqdn	1800-0700	5 — *3630 SF Only
445	8,470	Combt Crew Tng Sqdn	1800-0700	5 — *4540 SF Only
473	8,400	Combt Crew Tng Sqdn	1800-0700	5 — *4300 SF Only
477	13,630	Combt Crew Tng Sqdn	1800-0700	5 — *8000 SF Only
905	7,600	Combt Crew Tng Sqdn	1800-0700	5 — *4100 SF Only
436	8,500	Combt Crew Tng Sqdn	1800-0700	5 — *4750 SF Only
601	10,392	Field Training Det	1800-0700	5
610	5,369	Field Training Det	1800-0700	5
958	5,734	Target Intelligence	1800-0700	5
627	1,560	Disaster Control	1800-0700	5
859	7,672	Special Weapons Tng	1800-0700	5 — See Note #2
432	3,280	S.M. F-104 Contract	1800-0700	5
628	1,350	Office of Security Inv	0800-1630	5
176	4,070	Base Communications	1800-0700	6 — *700 SF Only
228	1,450	TAC Management Team	1800-0700	5
121	13,921	Finance	1800-0700	5 — Vacuum Cleaning only in the 1071 SF Computer room
218	1,550	Cont Maint	0800-1630	5
275	1,630	Driver Education	1800-0700	5
313	6,344	Purchasing & Contr	1800-0700	5 — *3430 SF Only
333	960	Transport Freight Off	1800-0700	5
324	3,270	Commercial Transp	1800-0700	5
550	4,268	Base Library	1800-0700	6
320	1,632	Commissary Office	1800-0700	5
1112	2,000	Family Service & Pers Affairs	0800-1630	5

Note #1: Three (3) rest room facilities plus 1600 SF of lounge area regular services every 12 hours in lieu of 24 hours, 7 days a week.

Note #2: These buildings contain blackboards to be serviced.

*Extended services for these buildings shall include:

1. b(damp mopping, and u(application of floor finish) weekly.
2. bb(floor finish removal) and cc(application of floor finish) quarterly.

Example: In Bldg. 151 which has 2,760SF, the 560 SF only means that while the entire building receives standard service, only 560 SF receives extended service.

APPENDIX A.

Order.

In the United States Court of Claims.

Service Technicians, Inc. v. The United States. No. 199-73.

Before DAVIS, *Judge,* Presiding, KASHIWA and KUNZIG, *Judges.*

This case comes before the court on plaintiff's request, filed March 28, 1974, for review by the court of the recommended decision filed by Trial Judge George Willi on February 22, 1974, pursuant to Rule 166(c) on plaintiff's motion and defendant's cross-motion for summary judgment, having been submitted on the briefs and oral argument of counsel. On the basis of Trial Judge Willi's discussion in his opinion (copies of which have been forwarded to the parties), the court is of the view that the Government's construction of the contract is correct and that, at the best for plaintiff, the contract had a glaring ambiguity calling upon plaintiff to make an inquiry before bidding and before following its own unilateral interpretation (even if that interpretation, standing by itself, might be considered reasonable). See *Space Corporation v. United States,* 200 Ct.Cl. 1, 470 F.2d 536 (1972).

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

BY THE COURT
/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

Jan. 17, 1975.

APPENDIX B.

Opinion.*

In the United States Court of Claims, Trial Division.

Service Technicians, Inc. v. The United States. No. 199-73.

Filed: Feb. 22, 1974.

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment.

Ronald S. Berman, attorney of record, for plaintiff.

Lawrence S. Smith, with whom was *Acting Assistant Attorney General Irving Jaffe,* for defendant.

WILLI, *Trial Judge:* Plaintiff, a janitorial service concern, brings this suit under the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1970), to upset an affirmance[1] by the Armed Services Board of Contract Appeals (the Board) of a contracting officer's denial of plaintiff's claim for additional compensation under a June 18, 1971 fixed-price contract for the performance of various custodial services at Luke Air Force Base, Arizona, for the period July 1, 1971 to June 30, 1972.

While the subject contract covered all of the cleaning and litter disposal operations necessary to the general upkeep of a number of different types of buildings on the base, forty-nine in all, the present controversy involves only a disagreement as to the contractor's obligations respecting the cleaning and care of floor

*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 166(c). The necessary facts are stated in the opinion.

[1]72-2 BCA ¶ 9673. In a subsequent unreported decision of April 2, 1973 the Board denied plaintiff's motion for reconsideration.

surfaces. Specifically, the contract provided for both "regular custodial service" and "extended custodial service."

Plaintiff contends here, as it did unsuccessfully before the Board, that as applied to floor care for a given area the terms are mutually exclusive under the contract so that any floor area within its coverage is to receive either regular service or extended service but not both.

It is unnecessary to decide whether the defendant's contrary interpretation of the contract requirements is implicit in every bit of relevant contract language because it is clear that plaintiff's understanding was so patently lacking in reasonableness, in the context of the contract as a whole, that it cannot be excused from having failed to seek clarification prior to submission of its bid. *Space Corp. v. United States,* 200 Ct. Cl. 1, 5-6, 470 F.2d 536, 538-39 (1972). A bare showing of ambiguity does not license a contractor to proceed under an interpretation of his own choosing.

In its petition and subsequent moving papers in this court, plaintiff bases the reasonableness of its mutual exclusivity construction of the contract requirements primarily on the factual assertion that since both types of service required a weekly damp mopping (a matter not in dispute): "* * * the only difference between extended custodial service under the contract and regular custodial service was that floor finish removal and application of floor finish was to be provided on a quarterly basis [in the case of extended service] rather than on a semi-annual basis [as in regular service]." Pet., § 4.

As will be seen, the above assumption is totally invalidated by unmistakable language in this contract that in certain other respects is not without some ambiguous terminology.

The solicitation for bids in this instance included: (1) Instructions, Conditions and Notices to Offerors; (2) Technical Specifications; (3) Floor Plans, and (4) Service Charts.

Paragraph 22 of the Instructions, Conditions and Notices to Offerors, entitled Site Visit, provided as follows:

> Bidders are urged and expected to inspect the site where services are to be performed and to satisfy themselves as to all general and local conditions that may affect the cost of performance of the contract, to the extent such information is reasonably obtainable. In no event will a failure to inspect the site constitute grounds for withdrawal of a bid after opening or for a claim after award of the contract.

In respect to the above provision the Board observed that the record before it gave no affirmative indication as to whether plaintiff did or did not avail itself of the opportunity to inspect the premises that were to receive the custodial services for which it intended to bid. 72-2 BCA at 45,150. Plaintiff has provided no greater illumination on the matter in this proceeding. It seems fair to observe, however, that in the circumstances of this case, a visit to the site would have most likely, if not certainly rectified plaintiff's misapprehension of the

work requirements. Thus, the floor plans with which plaintiff had been provided as a part of the bidding documents showed a plan view of each of the buildings to be serviced, with the portions thereof that were to receive extended service identified by cross-hatching. Had plaintiff gone to the site it would have realized that the areas designated for extended service were for the most part subjected to so much more intense pedestrian traffic and use than were the regular service areas that a commensurate differential in the degree of necessary floor care would entail a far greater difference than just the two floor finish applications and removals per year that it says it implied on its own. The Board's inference to that effect is not shown in the present proceeding to have lacked substantial support. 72-2 BCA at 45,149.

Paragraph 1-02 of Section 1, Scope of Work, of the Technical Provisions, following a narrative introduction concluding with the statement that: "A pre-bid conference of interested prospective bidders and tour of the buildings in the schedule of items will be arranged", presented an annotated tabulation setting forth for each of the forty-nine buildings involved in the contract the same information as that given for the base post office, as follows:

Bldg. Nr.	Sq. Ft. Floor Area	Description (Facility Occupant)	Time Period Available For Work Performance	Number Days Per Week
151	2,760	Post Office	0800-1630	6—*560 SF Only

Insofar as pertinent here, a footnote at the bottom of the tabulation stated as follows:

> *Extended services for these buildings shall include:
>
> 1. b (damp mopping), and u (application of floor finish) weekly.
> 2. bb (floor finish removal), and u (application of floor finish) quarterly.
>
> Example: In Bldg. 151 which has 2,760 SF, the + 560 SF only means that while the entire building receives standard service, only 560 SF receives extended service.

* * *

The floor plan for the post office shows the cross-hatching denoting extended service in a strip along the building's interior walls, with the explanation that it signifies the "mail box area."

Were it not for the express statement in the footnote example to the effect that "* * * the entire building receives standard service * * *", the square footage entries preceded by an asterisk and followed by the word "only," as appearing in the columnar tabulation, would be as susceptible of meaning that the referenced number of feet were to receive extended service only as they would to connote that only that number of feet were to receive extended service. If nothing else were involved, plaintiff's conception of its contractual responsibilities might well prevail in accordance with the

familiar principles applicable to the construction of a unilaterally drawn contract. *WPC Enterprises, Inc. v. United States,* 163 Ct. Cl. 1, 6-7, 323 F.2d 874, 876-77 (1963). Plaintiff may not, however, persist in its conception by ignoring the countervailing import of either the express declaration in the tabulation's interpretative footnote or other pertinent indicia, such as the associated floor plan, and the service chart to be next discussion;[2] to say nothing of eschewing both the opportunity of attending a pre-bid conference and the repeated invitation to make a site inspection. *Beacon Construction Co. v. United States,* 161 Ct. Cl. 1, 6-7, 314 F.2d 501, 504 (1963). If not alone, certainly in combination, these factors render plaintiff's proffered understanding unreasonable and therefore without the pale of the *WPC* principle. *Randolph Engineering Co. v. United States,* 176 Ct. Cl. 872, 880, 367 F.2d 425, 429-30 (1966).

The contract document that totally discredits the premise on which plaintiff relies to support the reasonableness of its interpretation of the contract's work requirements, *viz.*, that the only difference between regular and extended custodial service on floors is two applications and removals of primary finish per year, is a so-called service chart. On that chart each building is identified by number, usage and total square footage. For example, the seventh entry on the chart refers to Bldg. No. 151, the 2,760 square-foot Post Office building described just as it is in the footnote illustra-

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[2] *Victory Carriers, Inc. v. United States,* 199 Ct. Cl. 410, 467 F.2d 1334, 1342 (1972); *Hol-Gar Manufacturing Co. v. United States,* 169 Ct. Cl. 384, 395-96, 351 F.2d 972, 979 (1965).

tion, previously discussed, that expressly states that the entire building is to receive standard service. For each building and in separate categories labeled "Regular Custodial Service" and "Extended Custodial Service" the chart specifies the nature and frequency of each of the custodial functions to be performed. Under the heading "Extended Custodial Service" appear three subheadings: one entitled "Area In Square Feet Of Extended Services"; a second entitled "Every Week," under which the functional notations "Damp-Mop Floors" and "Application Floor Finish" appear; and the third entitled "Quarterly," under which the companion items "Floor Finish Removal" and "Primary Floor Finish" appear. As opposed to just the weekly and quarterly subheadings found under the heading of "Extended Custodial Service," there are six comparable subheadings under "Regular Custodial Service," *e.g.*, "Daily," "Every Other Day," "Weekly," Quarterly," "Semi-Annual" and "Annual." One of the six separate operations specified under the subheading "Daily" is "Sweep Interior Floors," an undertaking not elsewhere mentioned on the chart and notably missing from the "Extended Service Category." Thus, crediting plaintiff's avowed impression of the mutual exclusivity of floor care obligations would require the assumption that the footage earmarked in the chart for "Extended Custodial Service" was not to be swept during the entire one-year term of the contract—an hypothesis that by anyone's standards, janitor even more than judge, completely transcends the most extravagant limits of the "zone of reasonableness" envisioned in *WPC Enterprises, supra.*

Two matters remain for consideration. Both were considered and rejected by the Board in its April 2, 1973

denial[3] of plaintiff's motion for reconsideration of the reported decision of September 7, 1972. 72-2 BCA ¶ 9673.

In its initial decision the Board observed, in passing, that plaintiff had confirmed defendant's interpretation of the contract by filing a performance schedule, as required by Paragraph 2-07 of the Technical Provisions, showing that extended service would be furnished in addition to, rather than in lieu of regular service. 72-2 BCA at 45,149. In its motion for reconsideration plaintiff asserted that it had prepared the schedule in that manner only because the contracting officer threatened default termination if it failed to do so. Accordingly, it sought leave to reopen so that it could adduce additional evidence showing that this had been the case.

The Board correctly dismissed plaintiff's duress argument because the contracting officer's threat, if made, demanded no more than adherence to the only reasonable interpretation of the contract's work requirements. *Hicks Corp. v. United States*, 203 Ct. Cl. ...., 487 F.2d 520, 522 (1973); *Beatty v. United States*, 144 Ct. Cl. 205, 207, 168 F. Supp. 204, 207 (1958).

Finally, plaintiff accompanied its motion for reconsideration with affidavits from two of the eight unsuccessful bidders on the subject contract. Each affiant stated in wholly conclusory fashion that he had prepared his bid on the assumption that all extended service required by the contract was to be furnished in lieu of, rather than in addition to regular service. The Board summarily rejected the notion that these materials imparted reasonableness to plaintiff's similar view of the contract, saying: "We are not convinced that there is

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[3]See n. 1, *supra*.

any magic in mathematical equations in determining the reasonableness of an interpretation of contract language. Just because one-third of the bidders read the language the same way does not mean that they were right and we find that this evidence is unconvincing."

Were the parties' competing interpretations in even colorable balance, the understandings of other bidders would certainly be at least arguably relevant. But where, as here, one of the versions becomes tenable only if substantial portions of the contractual writing are ignored, then the only rational assumption as to others who reached the same view is that they did so by similarly closing their eyes to the obvious. So derived, an interpretation unanimously announced by a battalion of bidders is meaningless. *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875).

CONCLUSION

For the reasons given, plaintiff's motion for summary judgment should be denied, defendant's motion for summary judgment granted, and the petition dismissed.

APPENDIX C.

Opinion on Motion for Reconsideration and Motion for Oral Hearing and Leave to Take Depositions.

Armed Services Board of Contract Appeals.

Appeal of—Service Technicians, Inc. Under Contract No. F02604-71-C-2011. ASBCA No. 16996.

Appearances for the Appellant: H. Roy Jeppson, Esq., Jeppson and Berman, Marina Del Rey, California.

Appearances for the Government: Colonel William F. Herbert, USAF, Chief Trial Attorney, John Q. Adams, Esq., Trial Attorney.

Appellant filed a timely Motion for Reconsideration of the Board's decision (72-2 BCA par. 9673) and also a Motion for Oral Hearing and Leave to take Depositions.

The parties submitted the appeal for decision on the record. That record consisted of the pleadings and the Rule 4 file as supplemented by an affidavit of appellant's executive vice-president and the non-commissioned officer in charge of the office which let, awarded and administered the contract and, finally, a brief filed by appellant.

In the contracting officer's final decision he stated that appellant had submitted a frequency schedule (as it was required to do under the contract) which was not in conformance with appellant's later contention as to performance of the services. The affidavit submitted by the non-commissioned officer in charge of the

procurement division adverted, briefly, to such portion of the contracting officer's final decision. The next reference to this frequency schedule was in the brief filed by appellant's counsel wherein he stated:

> "The Declaration of Msgt Brian L. Finnemore states in Paragraph 5 thereof that the contractor did, in fact, submit an acceptable approved annual performance schedule on 27 July 1972 [sic]. This schedule was submitted by the contractor under threat of default by the contracting officer if a schedule was not submitted in accordance with the government's views. The submission of the schedule under direction of the contracting officer does not in any way constitute a waiver by Appellant of its claim hereunder."

The Board in its decision referred to the frequency schedule issue as follows:

> "It should be noted that appellant's statement as to its understanding that no extended weekly service was required is somewhat contracted by the fact that its weekly service schedules submitted under TO 2-07 contained provisions for both regular and extended weekly service. Appellant's counsel, in his brief, has tried to downgrade the significance of this schedule by stating that it was only submitted as a result of a threat of a termination if a schedule meeting the contracting officer's understanding of the contract terms was not submitted. There is no evidence of any such threats or other duress to submit the schedule in that manner."

The sole issue involved in the appeal was one of contract interpretation. Appellant contended that by the

language of the contract certain services listed therein were to be performed in lieu of other services also listed, while respondent contended that both had to be performed. The Board concluded that when the contract was read as a whole there was only one reasonable interpretation of its terms and that was the interpretation made by respondent. We found that appellant's interpretation was unreasonable because it rendered a significant portion of the contract language meaningless while respondent's interpretation gave meaning and purpose to all parts of the contract. After we had concluded that appellant's interpretation was not reasonable we set forth our views as to the frequency schedule as we have heretofore quoted them.

In its Motion for Reconsideration appellant states that the Board gave "great weight" to the fact that appellant had submitted a frequency schedule which conformed to respondent's view of the contract language. It thereafter submitted an affidavit of the supervisor appellant employed at the job site to the effect that he had only submitted that schedule as a result of a threat of default termination if he failed to do so. To counteract that affidavit the Government submitted affidavits of the two Government personnel who were alleged to have made the threats and they denied having made them. It is to explore this area of the controversy that appellant seeks leave to take depositions of the two Government witnesses and to have an oral hearing to develop the matter further.

Appellant is incorrect in concluding that we gave "great weight" to the frequency schedule. We mentioned it in passing mainly because appellant's counsel had alluded to it in his brief and had made statements regarding it not supported by the record. As a

matter of fact, insofar as the dispute is concerned it would have made no difference if the frequency schedule had never been submitted. The positions of the parties were not changed by the schedule and it was required as a planning guide so that the parties would know when during the performance period the work would be accomplished. The frequency schedule did not establish the work requirements but rather the contract itself did that. For purposes of deciding the Motion for Reconsideration we will assume that the evidence which appellant wishes to introduce would establish that appellant was, in fact, required to submit a frequency schedule which was contrary to its interpretation of the contract terms. So assuming, we find that such factor is irrelevant to the issue to be decided. Determining that appellant was forced to submit a frequency schedule which conformed to respondent's views and was contrary to its own does not establish that appellant's interpretation of the contract terms was reasonable. The unreasonableness of its interpretation was established, as we stated in our decision, by the fact that it rendered meaningless a portion of the work schedule. We cannot perceive how it could benefit appellant to take the depositions of the two Government witnesses and to have an oral hearing on the issue of the frequency schedule. Were we to allow such request we would still be faced with the identical question which we decided in our decision i.e., whether appellant's or respondent's interpretation of the contract terms is correct. Under these circumstances no useful purpose would be served by appellant's taking of depositions and presenting evidence on this issue at an oral hearing. Appellant's motion in this regard is denied.

Appellant also seeks to show that its interpretation was reasonable by submitting affidavits of the presidents of two other firms which submitted bids pursuant to the Invitation for Bids which resulted in the award of this contract to appellant. In each instance the respective president stated that in preparing his bid it was assumed that the extended services were in lieu of, and not in addition to, the regular services listed in the work schedule. In connection with the submission of each of these affidavits appellant asserts that the existence of these facts was not known until after our decision was rendered, presumably to qualify them as newly discovered evidence. It should be noted that in order to establish that evidence is newly discovered, more must be shown than the fact that the evidence was only discovered after the hearing or decision. A showing must also be made that such evidence could not have been discovered, through the exercise of reasonable diligence, before the hearing or decision. Appellant has not shown that it could not have obtained the evidence it now seeks to have considered before we rendered our decision. Technically, therefore, appellant has failed to show the existence of newly-discovered evidence. However, in the exercise of our discretion, we will consider these affidavits.

Appellant states that there were nine bidders for this contract including itself and that two others and appellant—one-third of the bidders—read the proposed contract terms in the same way. It thus concludes that the terms must have been unclear and ambiguous. We are not convinced that there is any magic in mathematical equations in determining the reasonableness of an interpretation of contract language. Just because one-third of the bidders read the language the

same way does not mean that they were right and we find that this evidence is unconvincing. See *Gelco Builders & Burjay Construction Corp.*, GSBCA No. 734 (24 May 1963); Motion for reconsideration denied 29 November 1963; *Gelco Builders & Burjay Construction Corp. v. United States,* 177 Ct. Cl. 1025 (1966).

Even if we were to find, as a result of appellant's evidence, that the contract language was ambiguous, we would be required to conclude that the ambiguity was a patent one because it would require that one portion of the specification be read out of the contract entirely. An ambiguity which causes that result is a glaring discrepancy. Where a bidder is faced with a patent or glaring discrepancy he must seek clarification from the Government's representative if he intends to bridge the crevasse in his own favor. *Beacon Construction Co. v. United States,* 161 Ct. Cl. 1, 7 (1963); *J. A. Jones Construction Co. v. United States,* 181 Ct. Cl. 1, 12, 13 (1968); *Brezina Construction Co. v. United States,* 196 Ct. Cl. 29, 34 (1971). Since appellant did not do that it is not now in a position to complain.

We have carefully reexamined the entire record. We have assumed, arguendo, that the frequency schedule submitted by appellant on or about 27 July 1971 was submitted as it was as a result of threats by Government personnel to terminate the contract for default if the schedule were submitted in any other manner. We have also considered fully the affidavits submitted by appellant and the points raised by appellant's counsel in his Memorandum of Points and Authorities in Support of Motion for Reconsideration.

After having considered all of the above we reach the same conclusion we did originally. This contract was not ambiguous since there was only one reasonable interpretation and that was the interpretation of the Government. We must, therefore, and hereby do reaffirm our earlier decision.

Dated 2 April 1973.

I concur
/s/ Rudolf Sobernheim
RUDOLF SOBERNHEIM
Member of Division No. 8
Armed Services Board of
Contract Appeals

I concur
/s/ Richard C. Solibakke
RICHARD C. SOLIBAKKE, Chairman
Armed Services Board of
Contract Appeals and
Member of Division No. 8

/s/ Basil S. Norris,
BASIL S. NORRIS, Lt. Col., USAF
Member of Division No. 8
Armed Services Board of
Contract Appeals

I concur
/s/ William J. Ruberry
WILLIAM J. RUBERRY
Member of Division No. 8
Armed Services Board of
Contract Appeals

I concur

/s/ Harris J. Andrews

HARRIS J. ANDREWS, JR., Vice
Chairman, Armed Services Board
of Contract Appeals and
Member of Division No. 8

I certify that the foregoing is a true copy of the opinion and decision of the Armed Services Board of Contract Appeals in ASBCA No. 16996, appeal of Service Technicians, Inc., rendered in conformance with the Board's Charter.

Dated:

GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

APPENDIX D.

Opinion by Lt. Colonel Norris.

Armed Services Board of Contract Appeals.

Appeal of Service Technicians, Inc. Under Contract No. F02604-71-C-0211. ASBCA No. 16996.

Appearances for the Appellant: H. Roy Jeppson, Esq., Jeppson and Berman, Marina Del Rey, California.

Appearances for the Government: Colonel William F. Hebert, USAF, Chief Trial Attorney, John Q. Adams, Esq., Trial Attorney.

This is an appeal from a final decision of the contracting officer requiring appellant to furnish extended custodial services in addition to, rather than in lieu of, regular custodial services. The parties have submitted the dispute for resolution on the record which consists of the pleadings, Rule 4 documents, affidavits submitted by each party and a brief filed by appellant's counsel. The parties have agreed that only the issue of entitlement is presently before the Board with the issue of quantum, if any, reserved for later consideration.

I
FINDINGS OF FACT

A. *The Contract.*

Respondent awarded Contract No. F02604-71-C-0211 to appellant on 18 June 1971. For the firm fixed price of $102,182.28 appellant was required to provide specified custodial services at Luke Air Force Base, Arizona during the period from 1 July 1971 through 30 June 1972.

The contract provisions applicable to this dispute are as follows:

"TP 1-02 * * *

Bldg. Nr.	Sq. Ft. Floor Area	Description (Facility Occupant)	Time Period Available For Work Performance	Number Days Per Week
151	2,760	Post Office	0800-1630	6—*560 SF Only

* * *

"*Extended service for these buildings shall include:

1. b(damp mopping), and u(application of floor finish) weekly.
2. bb(floor finish removal) and cc(application of floor finish) quarterly.

"Example: In Bldg. 151 which has 2,760SF, the + 560 SF only means that while the entire building receives standard service, only 560 SF receives extended service."

All of the other buildings listed which required extended services had an asterisk in the last column which referred to the note and example set forth above.

Also included in the contract are twenty-two pages of extended service floor plans. Several examples of these plans will suffice to show what they were intended to, and did, convey. Building 151 is the Base post office building. The floor plan for this building has a hatched area with a notation stating that the extended service area is the mail box area. Building 17 houses the bank, resident auditor and the Red Cross. The floor plan for this building states that the extended service area is the lobby of the bank. Building 11 is the Wing Headquarters building. The note on that floor plan states that all floors, except carpeted areas, are to receive extended service. Building 12, the Base Headquarters building is in the same category as the Wing

Headquarters, i.e., all floors, except carpeted areas, are to receive extended service. Other floor plans show hallways, lounge areas, areas directly in front of service desks or counters, class rooms, service club floors, etc. which are to receive extended service.

There were other documents in chart form which listed all the buildings. There are two major breakdowns entitled "Regular Custodial Service" and "Extended Custodial Service." Beneath the heading "Regular Custodial Service" are two columns showing the number of square feet to receive such service and the number of days per week the services were to be rendered. There are also six sub-headings. They are:

Daily
Every other day
Weekly
Quarterly
Semi-annual
Annual

Beneath each of these six sub-heading are specific tasks to be performed. Under the heading "Daily" are tasks such as "Clean and Wash Latrines and Shower Rooms," "Clean Water Fountains" etc. Under these columns an "X" appears opposite each building which is to receive the specific task.

Beneath the heading "Extended Custodial Service" are two subheadings. They are:

Every Week
Quarterly

Under the "Every Week" sub-heading are two tasks, i.e., "Damp Mop Floors" and "Application Floor Finish." Under the "Quarterly" subheading are two other tasks.

i.e., "Floor Finish Removal" and "Primary Floor Finish." Also under the major heading is a listing of the number of square feet which are to receive extended services. As was the case with the "Regular Custodial Service" an "X" appears opposite the building in which these services are required.

Using Building 151 as an example, the chart contained "X's" which showed that 2,760 square feet of the building would require four specific tasks to be performed daily, two to be performed every other day, four to be performed weekly, four to be performed quarterly, two to be performed semi-annually and two to be performed annually. It also showed that 560 square feet of that building would require two tasks to be performed every week and two to be performed quarterly. In other words, there were "X's" under both major headings, i.e., "Regular Custodial Service" and "Extended Custodial Service."

Perusal of these charts reveals that under the regular service "Weekly" column appellant was required to damp mop floors and apply floor finish. Under the extended service "Every Week" column it was also required to damp mop floors and apply floor finish. Under the regular service "Semi-Annual" column appellant had to remove floor finish and apply a primary floor finish. Under the extended service "Quarterly" column it also had to remove floor finish and apply a primary floor finish (Rule 4, Tab 2).

Technical Provision 2-07 required the contractor to furnish to the contracting officer an annual schedule within fifteen days after starting work. Such schedule had to show the day of the week that weekly services would be performed, day and week that quarterly serv-

ices would be performed and the dates and month that semi-annual services would be performed (Rule 4, Tab 2).

The Invitation for Bids which resulted in this contract contained a Site Visit clause which stated that prospective bidders were urged and expected to visit the site of the work and familiarize themselves with all local conditions affecting the work (Rule 4, Tab 2). The contract incorporates the ASPR 7-103.12(a) Disputes Clause by reference.

B. *Basis for Appellant's Bid.*

Appellant's Executive Vice President submitted an affidavit to the Board in which he stated that he was responsible for preparing appellant's bid. He also stated that in computing such bid he assumed that under Technical Provision TOP 1-02, Section I, Scope of Work in those instances where extended service was called for it was in lieu of and not in addition to the regular custodial services. He attached his work papers to his affidavit and claims that these papers support his contention that he did not include any factor in appellant's bid for performing the extended services in addition to the regular services (Affid. Bovee, 29 Jul 72).

C. *Contract Performance.*

Appellant commenced performance on 1 July 1971 thus by the provisions of TP 2-07 it was required to submit an annual schedule by 15 July 1971. In a meeting held on 12 July 1971 appellant advised that it would submit its schedule on that date. Some schedules were received by respondent by at least 23 July 1971. There was evidently some lack of or delay in communications between parties in the base procure-

ment office. On 27 July 1971 one contracting officer approved portions of the appellant's schedule submission. On 29 July 1971 another contracting officer sent a letter to appellant advising it that as of 22 July 1971 its schedule had not been submitted (Rule 4, Tab 4), whereas such a schedule had been submitted and approved (Rule 4, Tab 3). Appellant was later allowed to revise portions of its schedule and on 10 August 1971 the contracting officer approved the revised schedule. The schedule as approved by the contracting officer included provisions for the furnishing of both regular and extended weekly services (Rule 4, Tab 3).

On 20 August 1971 a cure notice was sent to appellant. Appellant was informed, among other things, that its failure to adhere to the approved schedule was endangering contract performance (Rule 4, Tab 4). Within a few weeks all of the items endangering performance had been corrected except the schedule problem. By letters of 31 August and 16 September 1971 appellant submitted two suggested additional revisions to the schedule neither of which included both regular and extended services. On 8 October 1971 the contracting officer advised appellant that he would ease the requirement for having each type of service performed on a specified day of the week but would not relax the requirement that both regular and extended services be performed (Rule 4, Tab 4). Appellant's counsel replied to the 8 October letter on 29 October 1971 by stating that appellant's interpretation was the correct one and if the contracting officer did not agree a final decision should be issued (Rule 4, Tab 1). The contracting officer's final decision, issued on 29 November 1971, required the performance of both regular and extended services (Rule 4, Tab 1).

II
DECISION

The issue to be decided here is whether the contract language as heretofore quoted required appellant to perform both regular and extended services as contended by respondent or whether the extended services were in lieu of the regular services as contended by appellant. It is, in other words, a question of contract interpretation.

The rules relating to contract interpretation are well settled. Contract language is ambiguous when it is susceptible to more than one reasonable interpretation. A contractor who reasonably interprets the language and acts thereon will be upheld unless the ambiguity was patent or glaring. This rule is based upon the theory that the drafter of the language, should, under such circumstances, bear the responsibility for its choice of language.

The key word is "reasonable." The court and board opinions which hold that contract interpretations must be reasonable are numerous and unanimous. Not every interpretation of which a party can conceive can be held to be reasonable.

In our opinion appellant's interpretation was not reasonable. Appellant has stated that it construed the language relating to extended services to mean that the only difference between regular service and extended service was that floor finish removal and the application of floor finish was to be done quarterly rather than semi-annually. Under appellant's interpretation the language of the contract relating to extended services on a weekly basis was rendered meaningless. The rule is well established that an interpretation which gives meaning and

effect to all portions of the contract language is preferred over one which renders a portion meaningless. See *Hol-Gar Manufacturing Corp. v. United States,* 169 Ct. Cl. 384 (1965); *States Roofing and Metal Company Inc.,* ASBCA No. 16265, 72-1 BCA par. 9453. Appellant would have us conclude that the language which states that an extended service required damp mopping and application of floor finish on a weekly basis in specified buildings was completely devoid of meaning. We cannot do as requested for it is apparent to us that these words do have meaning and that a reasonable interpretation can be applied to them. Under these circumstances appellant's interpretation is not reasonable. It should be noted that appellant's statement as to its understanding that no extended weekly service was required is somewhat contradicted by the fact that its weekly service schedule submitted under TP 2-07 contained provisions for both regular and extended weekly service. Appellant's counsel, in his brief, has tried to downgrade the significance of this schedule by stating that it was only submitted as a result of a threat of termination if a schedule meeting the contracting officer's understanding of the contract terms was not submitted. There is no evidence of any such threats or other duress to submit the schedule in that manner.

Examination of the documents in the contract reveal that something special was intended by the requirement for "Extended Custodial Service." The areas in which this service was required fell into two main categories. First, there were major common-use areas of heavy pedestrian traffic. The second category included areas most subject to the receiving of visitors, e.g., the Wing and Base Commander's Headquarters. These latter areas may also involve heavy pedestrian traffic. To any-

one in the janitorial services business it would be obvious that areas subjected to heavy foot traffic would require extra care to preserve the finish and appearance of the floor surfaces. Respondent's interpretation of the contract terms is that under regular services an entire building would be damp mopped once a week and have floor finish applied. For the areas of the building specifically designated to receive extended services a second damp mopping and application of floor finish would be required weekly. In other words, the entire building would be damp mopped and receive an application of floor finish once a week. A second damp mopping and another application of floor finish would be applied in areas receiving a great deal of wear. Likewise the floor finish would be stripped off the floor of the entire building twice a year while in the areas of greatest wear this operation would be required an additional four times. We find that this is a reasonable contractual requirement and that a reasonable interpretation of the contract language would have caused appellant to understand that that was what was required of it.

It is to be noted, too, that the solicitation, and the contract, contained the Site Visit Clause in which bidders were told that they were expected to visit the site of the work and satisfy themselves as to any conditions which would affect the work. The record does not reveal whether appellant did or did not visit the site. In either event it was afforded a full opportunity to inspect the areas where extended services were to be performed and to ask questions about the meaning of the requirements.

Appellant's Executive Vice President prepared the appellant's bid which resulted in the instant contract. He furnished an affidavit to the Board in which he stated

that he did not include any factor in appellant's bid for both regular and extended service since in his view the extended service was in lieu of the regular service. Giving full credence to this evidence it does not alter our opinion. At most this evidence would establish a unilateral mistake on appellant's part. As such, it does not authorize the payment of extra compensation for the services which appellant was required to provide by the terms of the contract in the absence of some evidence that the contracting officer knew or should have known of appellant's mistake. There is no evidence in this file to show that the contracting officer knew or should have known that appellant's bid was in error because it did not include a factor for performing both regular and extended services. Nor is there evidence of an obvious mistake on the face of the bid or any significant disparity between appellant's bid and other bids. There is nothing in the record before us which would justify granting appellant relief from performing the contract according to its terms and conditions.

It is obvious to us that appellant's Executive Vice President either overlooked the explanation of what extended services entailed or did not clearly understand it. If he overlooked the explanation that oversight is not compensable when the required work is actually insisted upon by the Government and performed by the appellant. See *Service Technicians, Inc.*, ASBCA No. 15609, 72-1 BCA par. 9327. If he did not understand what he read appellant is equally precluded from recovery for, as a matter of law, to sign a contract is to

know its clear and unambiguous terms. See *Symington Wayne Corp.*, ASBCA Nos. 8162, 8430 and 8431, 1964 BCA par. 4083. We have earlier held that the contract terms were clear and unambiguous since there was only one reasonable interpretation thereof.

Appellant's appeal is, therefore, denied.

Dated 7 September 1972.

I concur
/s/ William J. Ruberry
WILLIAM J. RUBERRY
Member of Division No. 8
Armed Services Board of
Contract Appeals

/s/ Basil S. Norris
BASIL S. NORRIS, Lt. Col., USAF
Member of Division No. 8
Armed Services Board of
Contract Appeals

RUDOLF SOBERNHEIM
Member of Division No. 8
Armed Services Board of
Contract Appeals is absent
on official business.

I concur.
/s/ Richard C. Solibakke
RICHARD C. SOLIBAKKE, Chairman
Armed Services Board of
Contract Appeals and Member
of Division No. 8

I concur
/s/ Joel P. Shedd
JOEL P. SHEDD, Vice Chairman
Armed Services Board of
Contract Appeals and Member
of Division No. 8

I certify that the foregoing is a true copy of the decision and opinion of the Armed Services Board of Contract Appeals in ASBCA No. 16996, Appeal of Service Technicians, Inc., rendered in conformance with the Board's Charter.

Dated: 12 September 1972

/s/ George L. Hawkes
GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

Opinion by Lt. Colonel Norris.

Armed Services Board of Contract Appeals.

Appeal of—Service Technicians, Inc. Under Contract No. F02604-71-C-0211. ASBCA No. 16996.

Appearances for the Appellant: H. Roy Jeppson, Esq., Jeppson and Berman, Marina Del Rey, California.

Appearances for the Government: Colonel William F. Hebert, USAF, Chief Trial Attorney, John Q. Adams, Esq., Trial Attorney.

This is an appeal from a final decision of the contracting officer requiring appellant to furnish extended custodial services in addition to, rather than in lieu of, regular custodial services. The parties have submitted the dispute for resolution on the record which consists of the pleadings, Rule 4 documents, affidavits submitted by each party and a brief filed by appellant's counsel. The parties have agreed that only the issue of entitlement is presently before the Board with the issue of quantum, if any, reserved for later consideration.

I

FINDINGS OF FACT

A. *The Contract.*

Respondent awarded Contract No. F02604-71-C-0211 to appellant on 18 June 1971. For the firm fixed price of $102,182.28 appellant was required to provide specified custodial services at Luke Air Force Base, Arizona during the period from 1 July 1971 through 30 June 1972.

The contract provisions applicable to this dispute are as follows:

"TP 1-02 * * *

Bldg. Nr.	Sq. Ft. Floor Area	Description (Facility Occupant)	Time Period Available For Work Performance	Number Days Per Week
151	2,760	Post Office	0800-1630	6—*560 SF Only

"*Extended services for these buildings shall include:

1. b(damp mopping), and u(application of floor finish) weekly.
2. bb(floor finish removal) and cc(application of floor finish) quarterly.

"Example: In Bldg. 151 which has 2,760SF, the + 560 SF only means that while the entire building receives standard service, only 560 SF receives extended service."

All of the other buildings listed which required extended services had an asterisk in the last column which referred to the note and example set forth above.

Also included in the contract are twenty-two pages of extended service floor plans. Several examples of these plans will suffice to show what they were intended to, and did, convey. Building 151 is the Base post office building. The floor plan for this building has a hatched area with a notation stating that the extended service area is the mail box area. Building 17 houses the bank, resident auditor and the Red Cross. The floor plan for this building states that the extended service area is the lobby of the bank. Building 11 is the Wing Headquarters building. The note on that floor plan states that all floors, except carpeted areas, are to receive extended service. Building 12, the Base Headquarters building is in the same category as the Wing Headquarters, i.e., all floors, except carpeted areas, are

to receive extended service. Other floor plans show hallways, lounge areas, areas directly in front of service desks or counters, class rooms, service club floors, etc. which are to receive extended service.

There were other documents in chart form which listed all the buildings. There are two major breakdowns entitled "Regular Custodial Service" and "Extended Custodial Service." Beneath the heading "Regular Custodial Service" are two columns showing the number of square feet to receive such service and the number of days per week the services were to be rendered. There aer also six sub-headings. They are:

Daily
Every other day
Weekly
Quarterly
Semi-annual
Annual

Beneath each of these six sub-heading are specific tasks to be performed. Under the heading "Daily" are tasks such as "Clean and Wash Latrines and Shower Rooms," "Clean Water Fountains" etc. Under these columns an "X" appears opposite each building which is to receive the specific task.

Beneath the heading "Extended Custodial Service" are two subheadings. They are:

Every Week
Quarterly

Under the "Every Week" sub-heading are two tasks, i.e., "Damp Mop Floors" and "Application Floor Finish." Under the "Quarterly" subheading are two other tasks, i.e., "Floor Finish Removal" and "Primary Floor

Finish." Also under the major heading is a listing of the number of square feet which are to receive extended services. As was the case with the "Regular Custodial Service" an "X" appears opposite the building in which these services are required.

Using Building 151 as an example, the chart contained "X's" which showed that 2,760 square feet of the building would require four specific tasks to be performed daily, two to be performed every other day, four to be performed weekly, four to be performed quarterly, two to be performed semi-annually and two to be performed annually. It also showed that 560 square feet of that building would require two tasks to be performed every week and two to be performed quarterly. In other words, there were "X's" under both major headings, i.e., "Regular Custodial Service" and "Extended Custodial Service."

Perusal of these charts reveals that under the regular service "Weekly" column appellant was required to damp mop floors and apply floor finish. Under the extended service "Every Week" column it was also required to damp mop floors and apply floor finish. Under the regular service "Semi-Annual" column appellant had to remove floor finish and apply a primary floor finish. Under the extended service "Quarterly" column it also had to remove floor finish and apply a primary floor finish (Rule 4, Tab 2).

Technical Provision 2-07 required the contractor to furnish to the contracting officer an annual schedule within fifteen days after starting work. Such schedule had to show the day of the week that weekly services would be performed, day and week that quarterly services would be performed and the dates and month that

semi-annual services would be performed (Rule 4, Tab 2).

The Invitation for Bids which resulted in this contract contained a Site Visit clause which stated that prospective bidders were urged and expected to visit the site of the work and familiarize themselves with all local conditions affecting the work (Rule 4, Tab 2). The contract incorporates the ASPR 7-103.12(a) Disputes Clause by reference.

B. *Basis for Appellant's Bid.*

Appellant's Executive Vice President submitted an affidavit to the Board in which he stated that he was responsible for preparing appellant's bid. He also stated that in computing such bid he assumed that under Technical Provision TP 1-02, Section I, Scope of Work in those instances where extended service was called for it was in lieu of and not in addition to the regular custodial services. He attached his work papers to his affidavit and claims that these papers support his contention that he did not include any factor in appellant's bid for performing the extended services in addition to the regular services (Affid. Bovee, 29 Jul 72).

C. *Contract Performance.*

Appellant commenced performance on 1 July 1971 thus by the provisions of TOP 2-07 it was required to submit an annual schedule by 15 July 1971. In a meeting held on 12 July 1971 appellant advised that it would submit its schedule on that date. Some schedules were received by respondent by at least 23 July 1971. There was evidently some lack of or delay in communications between parties in the base procurement

office. On 27 July 1971 one contracting officer approved portions of the appellant's schedule submission. On 29 July 1971 another contracting officer sent a letter to appellant advising it that as of 22 July 1971 its schedule had not been submitted (Rule 4, Tab 4), whereas such a schedule had been submitted and approved (Rule 4, Tab 3). Appellant was later allowed to revise portions of its schedule and on 10 August 1971 the contracting officer approved the revised schedule. The schedule as approved by the contracting officer included provisions for the furnishing of both regular and extended weekly services (Rule 4, Tab 3).

On 20 August 1971 a cure notice was sent to appellant. Appellant was informed, among other things, that its failure to adhere to the approved schedule was endangering contract performance (Rule 4, Tab 4). Within a few weeks all of the items endangering performance had been corrected except the schedule problem. By letters of 31 August and 16 September 1971 appellant submitted two suggested additional revisions to the schedule neither of which included both regular and extended services. On 8 October 1971 the contracting officer advised appellant that he would ease the requirement for having each type of service performed on a specified day of the week but would not relax the requirement that both regular and extended services be performed (Rule 4, Tab 4). Appellant's counsel replied to the 8 October letter on 29 October 1971 by stating that appellant's interpretation was the correct one and if the contracting officer did not agree a final decision should be issued (Rule 4, Tab 1). The contracting officer's final decision, issued on 29 November 1971, required the performance of both regular and extended services (Rule 4, Tab 1).

II
DECISION

The issue to be decided here is whether the contract language as heretofore quoted required appellant to perform both regular and extended services as contended by respondent or whether the extended services were in lieu of the regular services as contended by appellant. It is, in other words, a question of contract interpretation.

The rules relating to contract interpretation are well settled. Contract language is ambiguous when it is susceptible to more than one reasonable interpretation. A contractor who reasonably interprets the language and acts thereon will be upheld unless the ambiguity was patent or glaring. This rule is based upon the theory that the drafter of the language, should, under such circumstances, bear the responsibility for its choice of language.

The key word is "reasonable." The court and board opinions which hold that contract interpretations must be reasonable are numerous and unanimous. Not every interpretation of which a party can conceive can be held to be reasonable.

In our opinion appellant's interpretation was not reasonable. Appellant has stated that it construed the language relating to extended services to mean that the only difference between regular service and extended service was that floor finish removal and the application of floor finish was to be done quarterly rather than semi-annually. Under appellant's interpretation the language of the contract relating to extended services on a weekly basis was rendered meaningless.

The rule is well established that an interpretation which gives meaning and effect to all portions of the contract language is preferred over one which renders a portion meaningless. See *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384 (1965); *States Roofing and Metal Company, Inc.*, ASBCA No. 16265, 72-1 BCA par. 9453. Appellant would have us conclude that the language which states that an extended service required damp mopping and application of floor finish on a weekly basis in specified buildings was completely devoid of meaning. We cannot do as requested for it is apparent to us that these words do have meaning and that a reasonable interpretation can be applied to them. Under these circumstances appellant's interpretation is not reasonable. It should be noted that appellant's statement as to its understanding that no extended weekly service was required is somewhat contradicted by the fact that its weekly service schedule submitted under TP 2-07 contained provisions for both regular and extended weekly service. Appellant's counsel, in his brief, has tried to downgrade the significance of this schedule by stating that it was only submitted as a result of a threat of termination if a schedule meeting the contracting officer's understanding of the contract terms was not submitted. There is no evidence of any such threats or other duress to submit the schedule in that manner.

Examination of the documents in the contract reveal that something special was intended by the requirement for "Extended Custodial Service." The areas in which this service was required fell into two main categories. First, there were major common-use areas of heavy pedestrian traffic. The second category included areas most subject to the receiving of visitors, e.g.,

the Wing and Base Commander's Headquarters. These latter areas may also involve heavy pedestrian traffic. To anyone in the janitorial services business it would be obvious that areas subjected to heavy foot traffic would require extra care to preserve the finish and appearance of the floor surfaces. Respondent's interpretation of the contract terms is that under regular services an entire building would be damp mopped once a week and have floor finish applied. For the areas of the building specifically designated to receive extended services a second damp mopping and application of floor finish would be required weekly. In other words, the entire building would be damp mopped and receive an application of floor finish once a week. A second damp mopping and another application of floor finish would be applied in areas receiving a great deal of wear. Likewise the floor finish would be stripped off the floor of the entire building twice a year while in the areas of greatest wear this operation would be required an additional four times. We find that this is a reasonable contractual requirement and that a reasonable interpretation of the contract language would have caused appellant to understand that that was what was required of it.

It is to be noted, too, that the solicitation, and the contract, contained the Site Visit Clause in which bidders were told that they were expected to visit the site of the work and satisfy themselves as to any conditions which would affect the work. The record does not reveal whether appellant did or did not visit the site. In either event it was afforded a full opportunity to inspect the areas where extended services were to be performed and to ask questions about the meaning of the requirements.

Appellant's Executive Vice President prepared the appellant's bid which resulted in the instant contract. He furnished an affidavit to the Board in which he stated that he did not include any factor in appellant's bid for both regular and extended service since in his view the extended service was in lieu of the regular service. Giving full credence to this evidence it does not alter our opinion. At most this evidence would establish a unilateral mistake on appellant's part. As such, it does not authorize the payment of extra compensation for the services which appellant was required to provide by the terms of the contract in the absence of some evidence that the contracting officer knew or should have known of appellant's mistake. There is no evidence in this file to show that the conracting officer knew or should have known that appellant's bid was in error because it did not include a factor for performing both regular and extended services. Nor is there evidence of an obvious mistake on the face of the bid or any significant disparity between appellant's bid and other bids. There is nothing in the record before us which would justify granting appellant relief from performing the contract according to its terms and conditions.

It is obvious to us that appellant's Executive Vice President either overlooked the explanation of what extended services entailed or did not clearly understand it. If he overlooked the explanation that oversight is not compensable when the required work is actually insisted upon by the Government and performed by the appellant. See *Service Technicians, Inc.*, ASBCA No. 15609, 72-1 BCA par. 9327. If he did not understand what he read appellant is equally precluded from recovery for, as a matter of law, to sign a con-

tract is to know its clear and unambiguous terms. See *Symington Wayne Corp.*, ASBCA Nos. 8162, 8430 and 8431, 1964 BCA par. 4083. We have earlier held that the contract terms were clear and unambiguous since there was only one reasonable interpretation thereof.

Appellant's appeal is, therefore, denied.

Dated 7 September 1972.

I concur
/s/ William J. Ruberry
WILLIAM J. RUBERRY
Member of Division No. 8
Armed Services Board of
Contract Appeals

/s /Basil S. Norris
BASIL S. NORRIS, Lt. Col., USAF
Member of Division No. 8
Armed Services Board of
Contract Appeals

RUDOLF SOBERNHEIM
Member of Division No. 8
Armed Services Board of
Contract Appeals is absent
on official business.

I concur.
/s/ Richard C. Solibakke
RICHARD C. SOLIBAKKE, Chairman
Armed Services Board of
Contract Appeals and Member
of Division No. 8

I concur

/s/ Joel P. Shedd

JOEL P. SHEDD, Vice Chairman
Armed Services Board of
Contract Appeals and Member
of Division No. 8

I certify that the foregoing is a true copy of the decision and opinion of the Armed Services Board of Contract Appeals in ASBCA No. 16996, Appeal of Service Technicians, Inc., rendered in conformance with the Board's Charter.

Dated 12 September 1972.

/s/ George L. Hawkes

GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1299

SERVICE TECHNICIANS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a decision of the Court of Claims construing a contract for custodial services.

On June 18, 1971, petitioner entered into a fixed-price contract with the government obligating it to perform various custodial services at Luke Air Force Base, Arizona, for the period July 1, 1971, to June 30, 1972. Shortly after petitioner began to perform under the contract, a dispute arose concerning the frequency of certain services required by the contract, petitioner contending that those areas designated for "regular custodial services" and those areas designated for "extended custodial services" were mutually exclusive (Pet. App. B; pp. 2-3). Petitioner performed the contract in accordance with the government's view of its contract obligations, and then sought additional compensation. The contracting officer denied petitioner's claim for additional compensation, and the Armed Services Board of

Contract Appeals denied petitioner's appeal (Pet. App. D) as well as petitioner's motion for reconsideration (Pet. App. C).

Petitioner then filed the present suit in the Court of Claims under the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321-322, seeking to overturn the decisions of the contracting officer and the Armed Services Board of Contract Appeals. In rejecting petitioner's claim, the trial judge stated that (Pet. App. B, pp. 7-8):

> [Petitioner] may not * * * persist in its conception [of the contract] by ignoring the countervailing import of either the express declaration in the tabulation's interpretative footnote or other pertinent indicia, such as the associated floor plan, and the service chart [next to be discussed]; to say nothing of eschewing both the opportunity of attending a pre-bid conference and the repeated invitation to make a site inspection.* * *
>
> * * * [C]rediting [petitioner's] avowed impression of the mutual exclusivity of floor care obligations would require the assumption that the footage earmarked in the chart for "Extended Custodial Service" was not to be swept during the entire one-year term of the contract—an hypothesis that by anyone's standards, janitor even more than judge, completely transcends the most extravagant limits of the "zone of reasonableness" * * *. [Footnote omitted.]

The Court of Claims affirmed (Pet. App. A, p. 1), noting both that "the court is of the view that the Government's construction of the contract is correct and that, at the best for [petitioner], the contract had a glaring ambiguity calling upon [petitioner] to make an inquiry before bidding and before following its own unilateral interpretation * * *. (*ibid.*).

We submit that the Court of Claims' decision is correct and that no further review is warranted. The government gave petitioner adequate opportunity to familiarize itself with the conditions under which the work it was bidding on was to be performed by inviting it to inspect the situs of the work, and to discuss the terms of the contract by inviting it to attend pre-bid conferences. There is no evidence in the record that petitioner availed itself of either opportunity; rather, it adopted in the view of the trial judge a patently unreasonable construction of the contract specifications, underbid its competitors on the basis of this unreasonable construction, and then sought relief through a claim for additional compensation. The Court of Claims was correct in holding that the government's construction of the contract was the correct one. If petitioner failed to construe the contract correctly, it did so only because it ignored the unreasonableness of its own contrary construction and did not take advantage of the ample opportunities to seek clarification prior to submitting a bid.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.